ATTACHMENT I

SWB
July 2, 2001

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SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

SOUTHWESTERN BELL TELEPHONE COMPANY'S
MOTION FOR REHEARING AND CLARIFICATION

Southwestern Bell Telephone Company (SWBT) files this Motion for Rehearing and Clarification of the Order issued on June 1, 2001, relating to the second collaborative Six Month Review process for Performance Measurements (PMs).

I. BACKGROUND

Project No. 20400 generally, and the Performance Measurements Six Month Review process specifically, is the product of exhaustive negotiations, tests, agreements and orders of the Commission that preceded its conclusion that SWBT complied with Section 271 of the federal Telecommunications Act of 1996 (FTA). The Commission and the parties to that process negotiated the Texas 271 Agreement (T2A), an interconnection agreement setting forth the terms by which any competitive local exchange carrier (CLEC) could provide local exchange service in Texas within SWBT's certificated territory. The entire T2A represents a series of "gives and takes" by all parties participating in the 271 Collaborative Process, culminating in part with a series of obligations imposed on SWBT together with limitations on the extent of those obligations.

SWBT's Performance Remedy Plan (which is Attachment 17 to the T2A) establishes the process known as the Six Month Review for Performance Measurements. As recognized by Section 6.5 of Attachment 17, as well as by the

Commission in the Open Meeting on December 13, 2000, prior to the most recent review, one of the goals of the Six Month Review is to reduce the number of PMs.[1] The Performance Remedy Plan does, however, recognize that changes to existing measurements may occur and that new measurements may be added. The plan specifically sets forth how such changes can occur or additional measurements can be added. On this, the T2A is very clear:

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.[2]

SWBT is committed to the Six Month Review Process as it has developed and as it was defined in the T2A and believes that the collaborative tone and substance are effective, appropriate, and productive. The first Six Month Review and its "gives and takes" lead to results and PMs to which SWBT ultimately agreed, as they were interpreted at the time. This most recent review, however has resulted in a few changes to the PMs which are regrettably unacceptable to SWBT. These changes, in SWBT's opinion, provide no benefit to CLECs or to the public, and will only lead to disputes as to their application in the future. SWBT's specific concerns include:

- As explained in greater detail below, SWBT opposes being required to implement new measurements that would assess to its performance under the interstate and intrastate tariffs for the provisioning of retail Special Access services. Special Access services are provided only as a consequence of and in accordance with tariffs; they are not part of the T2A and thus cannot legally be subject to the Performance Remedy Plan.
- The implementation of PM 1.2 as defined in this second Six Month Review is unacceptable because it cannot implemented as directed. SWBT had offered its interpretation of how to report data for PM 1.2, and that is the only way that SWBT is aware that the intent of PM 1.2 can be accomplished.

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[1] *See* the discussion of the Commission, Open Meeting, December 13, 2000, pp. 87-91.

[2] Attachment 17: Performance Remedy Plan – TX, Section 6.4 (emphasis added).

- Finally, the order regarding PM 13 is confusing as to whether it requires punitive penalties, for which there is no basis. SWBT requests clarification as to the intent of the Commission with regard to PM 13.

As a result, SWBT respectfully requests the Commission to reconsider and clarify its order relative to each of these three matters in light of SWBT's arguments below. Absent modifications on rehearing, SWBT will not be able to mutually agree to these PMs or their implementation.[3] According to the criteria set forth in Section 6.4 of Attachment 17, SWBT will seek to resolve any disputes concerning any potential Special Access measures and PMs 1.2 and 13 through the remedies set forth in the T2A.

II. REQUEST FOR RECONSIDERATION

A. THERE IS NO BASIS UNDER THE T2A'S PERFORMANCE REMEDY PLAN TO ORDER THE IMPLEMENTATION OF SPECIAL ACCESS PMs.

In its June 1, 2001, Order, the Commission stated that "to the extent that a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures."[4] At the Open Meeting on May 24, 2001, there was discussion regarding whether Special Access performance measures were necessary. Former Chairman Wood concluded the discussion with a direction to Staff to "see if there's really a disagreement"[5] about whether the CLECs must order certain services as UNEs or whether they must use the Special Access Tariffs.

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[3] In any event, the Performance Remedy Plan is a form of liquidated damages to which both parties must voluntarily agree in order for the remedy to be lawful and binding, as was done in the T2A. SWBT does not agree to liquidated damages for these identified PMs and any attempt to compel a negotiated agreement would constitute a violation of SWBT's constitutional right to due process.

[4] Order No. 33, June 1, 2001, p. 88.

[5] Open Meeting Transcript, Thursday, May 24, 2001, p. 28. The discussion regarding Special Access is contained within pp. 19-28. A review of that transcript demonstrates a significant amount of uncertainty.

In preparing for the workshop to address this issue, SWBT investigated whether CLECs have been forced to order out of either the interstate or intrastate tariffs regarding Special Access, and SWBT has been unable to locate a single instance wherein a CLEC was forced to order out of the Special Access Tariffs. Further, the CLECs have brought forth no specific evidence. They merely make generalized allegations, which are not supported by any specific facts. Under these circumstances there is no record that would support instituting any special access measurements, and thus SWBT cannot agree to do so. In the workshop held just last Friday, June 29, 2001, SWBT asked for specific examples and none were provided by the CLECs. Furthermore, in the workshop last Friday, it appeared that this issue had gone well beyond the very limited instruction of the Commission on the application of Special Access. SWBT is now required to comment on WorldCom's far more global proposal.[6] We believe the Commissioners rejected such a global approach at the Open Meeting of May 24, 2001.

SWBT and other carriers have provided Special Access services for over twenty years, since divestiture. Competition in the special access arena is alive and well, and the service is classified as non-basic under Public Utility Regulatory Act (PURA) in recognition of options which customers have for Special Access. Indeed, a wealth of providers has resulted in a keenly robust and competitive market. Because multiple sources for these services exist, there is no need to establish measurements assessing SWBT's performance in providing such mature services, particularly not the kind of

[6] Since the workshop on Special Access took place this past Friday, June 29, 2001, SWBT may supplement this motion after review of the transcript.

measurements which have been previously developed for the provision of wholesale UNEs (e.g., DS1 loops) utilized to provide local exchange service.

Given this circumstance, there also is no reason for the Commission to exceed its limited jurisdiction with respect to these retail Special Access services. Research discloses that approximately 94% of Special Access services in Texas are ordered from the interstate tariff (FCC Tariff 73) over which the FCC has jurisdiction. Moreover, even with respect to SWBT's intrastate Special Access Tariff, the tariff terms and conditions alone control the provision of access and this Commission cannot unilaterally change those tariff terms and conditions. Further, those tariffs contain their own performance penalties in the tariff or by contract with SWBT. Such potential double recovery is prohibited by the Performance Remedy Plan itself, which says that it is the exclusive contract remedy. Significantly, the Remedy Plan measures SWBT's performance under the T2A. The T2A does not include the provision of Special Access services. Accordingly, there is no permissible way to unilaterally extend the coverage of the interconnection agreements to services which are clearly interstate services.

It is of no consequence that some carriers may make a business decision to utilize retail special access services for providing local exchange service, instead of wholesale UNEs. The purpose of this Commission having originally established PMs in this docket was to ensure SWBT's FTA Section 271 compliance with the 14-point checklist after SBC Communications Inc. became authorized to provide long distance service in Texas. The checklist does not address retail Special Access services, and FCC has three times concluded that performance relative to provisioning of Special

Access services is not relevant to checklist compliance.[7] Consequently, there is no foundation for directing SWBT to institute any such measures for this additional reason.

SWBT is not agreeable to measuring its Special Access performance, either interstate and intrastate, within the framework of the T2A.

B. PM 1.2 CANNOT BE IMPLEMENTED AS DIRECTED.

PM 1.2 was proposed to compare loop makeup information[8] provided to any CLEC, including ASI, with loop makeup information contained in SWBT's engineering confirmation/design layout records (DLR). When a CLEC orders loop makeup information, SWBT retrieves that information from its loop assignment system for the assembled plant facilities capable of serving the location. Then, a CLEC may or may not order a loop. If the CLEC waits any significant amount of time, that loop information may change or it may not be the same for the loop, which is actually provisioned for the CLEC. PM 1.2 does not in any way accomplish the intended purpose, the measurement of the accuracy of SWBT's loop make-up information. As described in detail below, SWBT cannot agree to implement PM 1.2, as recently interpreted, for the following reasons:

- The network is dynamic and therefore "accuracy" cannot be reliably measured;

[7] Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, released April 16, 2001, n. 489 ("As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of Special Access services pursuant to tariffs for purposes of determining checklist compliance. *SWBT Texas Order*, 15 FCC Rcd at 18504, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340.")

[8] Loop make-up information is used by carriers to assist them in determining whether the loop facilities capable of serving a particular customer location might be suitable for use in the provision of advanced services, which are sensitive to characteristics of the loop plant. The information may include: loop length, length by segment, length by gauge, 26 gauge equivalent (calculated), presence of load coils, quantity of load coils (if applicable), presence of bridged tap, length of bridged tap (if applicable), presence of pair gain/Digital Loop Carrier equipment, and source of data (actual or designed).

- PM 1.2 creates a "Catch 22" discouraging SWBT from improving the network or its records;
- The recommendation to implement a "sampling" technique to measure "false positive" returns is unworkable and could place enormous new and unrecoverable costs on SWBT; and,
- SWBT should not have to, and is not legally required to, provide superior quality information to the CLECs than it does for itself.

1. The network is dynamic and therefore "accuracy" cannot be reliably measured.

The Business Rules[9] were established to measure parity when possible, or to set a benchmark when there is no retail analog to the wholesale item being measured. Staff's recommendation and the Commission's Order on the interpretation of PM 1.2 goes beyond the scope of the Business Rules themselves, and it requires action that can never be achieved by the requirements of this measurement. This measure simply reports whether SWBT's loop facility assignment system (LFACS) assigns the exact same facilities for which loop qualification results were forwarded to the CLEC. This will not and simply cannot occur if the CLEC has requested conditioning or if SWBT has performed a line and station transfer (LST) on the CLECs' behalf, situations that often occur. Thus, the measurement, as interpreted, cannot be met.

Because the network is constantly changing, loop makeup information is merely a "snap-shot" of the loop plant that exists as of the date and time that the information is retrieved. In many instances, new services are installed and other services are disconnected between the time that the loop qualification request is issued and when the loop is actually provisioned. As a result of these and other factors, the loop that is actually assigned some days or weeks later could be different than what was indicated

[9] The Business Rules describe the implementation of the specific PMs.

when loop makeup information was returned. The more time that separates a loop qualification request from provisioning, the less likely it is that the facility used will be the same. SWBT cannot reserve pairs for every loop qualification performed because the CLECs often do not issue an order for any loop, even if that loop is acceptable for the deployment of advanced services. Thus, PM 1.2 is measuring the accuracy of information which may never be used and for which no method exists to measure the accuracy of the information provided.

2. PM 1.2 creates a "Catch 22" discouraging SWBT from improving the network or its records.

Given that loop makeup information and DLR information are retrieved from the same databases, comparing the two does not serve any meaningful purpose, but that is what PM 1.2 would require. At the time a loop makeup request is processed, the DLR and the loop makeup information for the same loop, by definition, are essentially the same. Proposed PM 1.2, however, penalizes SWBT for updates to its DLR information and its loop makeup information, which occur after a loop makeup request has been processed. Further, it will also penalize SWBT for any updates in assignment of the loop and any work done in the network, including conditioning and line and station transfers. It thus creates the incentive for SWBT to cease maintaining, correcting, and updating its network records in order to avoid any future discrepancy between loop makeup and DLR information, and the accompanying imposition of penalty payments. Therefore, PM 1.2 creates the opposite incentives than those that SWBT believes the Commission intended.

PM 1.2, as presently written, places SWBT in a "Catch 22" position. Updating the records and correcting existing data errors will impose penalty payments upon

SWBT. Stop updating the records and correcting the existing data errors and business becomes unmanageable for both SWBT and the CLECs. SWBT does not believe that any performance measurement for actual loop makeup information is necessary, because plant design and database records are maintained at parity levels for both SWBT and the CLECs. PM 1.2, as is now being interpreted, simply does not accomplish what the data CLECs were attempting.

3. The recommendation to implement a "sampling" technique to measure "false" returns is unworkable, and could place enormous new and unrecoverable costs on SWBT.

Performing a statistically valid sample to validate those responses that were returned would be expensive, time consuming and take away from other critical service initiatives that are very important. Performing manual tests, physical plant inspections and other time consuming evaluations of engineering records are the only methods available for conducting such a sampling. It also must be considered that if the sample revealed a level of "accuracy" that was not acceptable (which it is likely to do considering how high the benchmark has been set), there is no means to increase the "accuracy" of the records in the databases (primarily LFACS) without spending an inordinate amount of resources. Further, the costs to perform sampling are estimated to be in the millions annually, and to test the entire network for accuracy and update the records would exceed a billion dollars over a multi-year period.

Imposing a sampling methodology would also force SWBT to remove data from its database when there is suspicion that the data is not accurate. This would increase the return of theoretical "worst case" data in more instances. For example, if it were determined that a particular geographic area was problematic, SWBT would not have the resources to measure all of the loops in that area and would instead remove the

problematic area of the plant from records. This would remove both "accurate" indications as well as "inaccurate" ones. Moreover, this sampling methodology and any associated broad testing of the network is only valid as long as the facility remains assembled. As soon as the components in the network "churn," that data must be removed as tested data only applies to that physical loop for the duration it remains in that configuration. Testing does not serve to address the accuracy of the component parts of the network and is never a permanent solution.

Should CLECs desire actual field confirmations of loop makeup information, let alone the supplementation of field information, SWBT will be compelled to pursue the recovery of the additional costs. Not surprisingly, the CLECs have not even suggested that they would be required to bear any portion of these costs. In any event, the benefits gained from SWBT's development of real-time electronic access to loop makeup information would be eviscerated if SWBT were required to manually recheck its plant, as suggested through the use of this unprecedented "sampling" technique.

4. SWBT is not required to provide CLECs loop make-up information that is superior in quality to that available to itself.

Even if this PM was modified to attempt to accomplish what the CLECs desired, the measure of accuracy of the loop makeup information, SWBT should only be required to supply the information it has, not to create superior information. SWBT's DLR records show the general location and condition of the plant, i.e., the cables, switches, and equipment in the field. These records have been developed over a long period of time in the provision of voice services, and are used by SWBT personnel in daily operations. The loop makeup information made available to affiliate and non-

affiliate CLECs is derived from this same source, thus ensuring nondiscriminatory access to the records by all network users.

Penalizing SWBT for not providing loop qualification information which matches perfectly with the actual state of SWBT's plant would require SWBT to provide the CLECs with more accurate loop makeup information than SWBT provides itself. This requirement directly contradicts the Eighth Circuit ruling in *Iowa Utilities Board II et al., v. FCC,* 219 F.3d 744 (8th Cir. 2000, *cert. granted*).[10] In that decision, the Eighth Circuit reiterated its earlier holding that incumbent carriers need not provide CLECs access to superior services:

> We again conclude the superior quality rules violate the plain language of the Act. . . . Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors. The phrase "at least equal in quality" establishes a minimum level for the quality of interconnection; it does not require anything more. We maintain our view that the superior quality rules cannot stand in light of the plain language of the Act. . . . We also note that it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided.

[10] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000) "*Iowa Utilities Board II*"), petitions for cert. granted sub nom. Verizon Communications Inc. v. FCC, 121 S. Ct. 877 (2001).

Id. at 758. As this extended discussion makes evident, the ILECs' legal obligations are defined by parity. The FCC has repeatedly recognized the same in its Section 271 proceedings, requiring incumbent carriers to provide non-discriminatory access, not perfection.[11]

Moreover, the FCC addressed this issue most directly in the *UNE Remand Order*, stating: "an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent. . . ."[12] Further, the FCC found that incumbent LECs are not required to:

> catalogue, inventory and make available to competitors loop qualification [loop-make-up] information through automated OSS even when it has no such information available to itself. If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers.[13]

As such, SWBT is only required to provide CLECs with the same information that is in its databases – and SWBT should not be penalized for inaccuracies in this information.

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[11] *See* Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service, ¶ 44, CC Docket No. 00-65 (June 30, 2000) ("[W]here a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness."); Bell Atlantic New York Order, 15 FCC Rcd at 3971, ¶ 44; Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, CC Docket No. 97-137, 12 FCC Rcd 20543, 20618-19.

[12] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; *Third Report And Order And Fourth Further Notice Of Proposed Rulemaking,* CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), ¶ 427. (Emphasis added).

[13] *Id*. at ¶ 429.

C. THE RESTATEMENT OF PM 13 DATA SHOULD NOT SUBJECT SWBT TO PUNITIVE PENALTIES.

The following provision in the June 1, 2001, Order regarding PM 13 is unclear in its intent:

> The Commission finds that, based on the discrepancy of corrected data that overstated its performance delivered to CLEC, SWBT shall pay liquidated damages. Such damages shall be set at high level on a per occurrence basis without a measurement cap to individual CLECs. In addition SWBT shall also pay Tier – 2 penalties based on the corrected data on a per occurrence basis.[14]

The level for Tier-1 penalties for PM 13 was previously set at the low level. SWBT has paid penalties to the individual CLECs on this basis. Information which was developed at the second Six Month Review lead Staff and SWBT to the understanding that SWBT had not been capturing and reporting the data as the Commission had originally intended, despite the fact that SWBT understood it was fully complying with this new PM. Therefore, SWBT has agreed to restate the data for PM 13 and to submit to an audit of its processes and data calculation. The above provision however, appears to order that the penalty level for Tier-1 be changed for the recalculation of that data from the low level to the high level. Retroactively increasing the level is tantamount to implementing a punitive penalty. There is no basis under the Performance Remedy Plan or the law to retroactively increase the level of payments. To make it clear, SWBT is willing to retroactively make any necessary payments that results from the restatement or audit described above — these payments however should be at the level established for this PM when it was developed, the low level. SWBT cannot agree that the Tier – 1 damage level should be changed retroactively

[14] Order No. 33, June 1, 2001, p. 78.

without a measurement cap. This cannot be the intent of the Commission. SWBT seeks further clarification as to the meaning of the Commission's order in this regard.

WHEREFORE, SWBT requests that the Commission's ruling in the Second Six Month review with regard to PM 1.2 be set aside, that the ruling on PM 13 be clarified, and that no Special Access levels of disaggregation be added to the UNE PMs, and for such other and further relief to which SWBT may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia F. Malone, Senior Counsel, for Southwestern Bell Telephone Company, certify that a copy of this document was served on all parties of record in this proceeding on the 2nd day of July, 2001 in the following manner: By hand delivery, facsimile and/or by U.S. Mail.

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